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Attorney for Defendant

Honorable Thomas O. Rice

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

BRIAN KNIFFEN,

Plaintiffs,

vs.

EAST WENATCHEE WATER  
DISTRICT,

Defendants.

Case No.: 2:23-cv-00344 TOR

DEFENDANT'S TRIAL BRIEF

**I. NATURE OF THE CASE**

This is an employment discrimination and reasonable accommodation case brought by Plaintiff, Brian Kniffen ("Plaintiff") against his employer of twenty-seven years, East Wenatchee Water District ("EWWD").

The case was filed on November 28, 2023, and a summary judgment order was entered on June 27, 2025. The remaining claims are a failure to provide reasonable accommodation under Federal and Washington law and disability discrimination. At summary judgment, the Court found that the job required Plaintiff to be able to lift up to 50 pounds and was prohibited from twisting

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1 therefore there was a question of fact as to whether or not Plaintiff could do the  
2 job with or without reasonable accommodation. At summary judgment the Court  
3 also dismissed all allegations of a failure to accommodate except for two;  
4 whether a truck mounted valve exerciser was a reasonable accommodation and  
5 whether it was a reasonable accommodation for EWWD to have informed  
6 Plaintiff about a position that opened up the day after he was terminated.  
7 Finally, the Court found that a question of fact remained as to whether or not  
8 Plaintiff was subjected to disparate treatment because he was terminated as a  
9 result of his disability. Defendants deny all the allegations.

10  
11 The case is set for trial in front the Honorable Thomas O. Rice for July 21,  
12 2025.

13  
**II. FACTUAL BACKGROUND**

14 Plaintiff Brian Kniffen (“Plaintiff”) was an employee with East Wenatchee  
15 Water District (“EWWD” or “Defendant”) for nearly 30 years. From 2014 until  
16 his separation from employment with EWWD in November 2021, Plaintiff  
17 served as a utility field inspector.

18 The job description for a Utility Field Inspector states that the job requires  
19 the employee holding that job to “regularly and frequently stand, walk, bend and  
20 twist,” and occasionally lift up to 75 pounds. The job also requires the employee  
21 to “work outdoors for extended periods of time under unfavorable conditions,”  
22 and generally to work in the field at construction sites. The job required the  
23 employee to open and close water valves.

24 On May 22, 2019, Plaintiff suffered an on-the-job injury affecting his low  
25 back. He was twisting a gate valve “with a large key when the key blew out as he

26  
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1 was twisting downward, and he injured his back.” Following that injury, Plaintiff  
2 was on modified duty with lifting, squatting, and crawling restrictions.

3 On August 19, 2019, Plaintiff underwent a left L3 extraforaminal  
4 discectomy to treat the aforementioned injury.

5 While recovering from his low back injury and subsequent surgery,  
6 Plaintiff worked light duty and was accommodated by EWWD. Accommodation  
7 was made by having another EWWD employee assist Plaintiff in tasks Plaintiff  
8 could not complete due to his restrictions.

9 On June 30, 2020, Plaintiff re-injured his back while turning a valve and  
10 experienced diffuse low back pain. He re-opened his original (May 22, 2019)  
11 worker’s compensation claim.

12 Subsequent to Plaintiff’s second back injury, he underwent an MRI that  
13 showed some degenerative disc changes, including a small bulge at L5-S1. He  
14 thereafter underwent an epidural steroid injection to the S1 region on May 12,  
15 2021.

16 The epidural steroid injection apparently did not offer relief, and on May  
17 21, 2021, PA-C David Hyde placed restrictions on Plaintiff. The restrictions  
18 limited Plaintiff to lifting no more than 50 pounds and was prohibited from  
19 engaging in twisting with torque. PA-C Hyde indicated that the restrictions were  
20 permanent. PA-C Hyde was Plaintiff’s treating provider.

21 An Independent Medical Exam was performed on Plaintiff and a  
22 corresponding report was issued on August 23, 2021. The report indicated that  
23 the June 2020 injury was not related to the 2019 low back injury, and that no  
24 restrictions were required for the June 2020 injury.

25 However, on September 23, 2021, PA-C Hyde again indicated that  
26 Plaintiff was permanently restricted from lifting more than 50 pounds and from  
27

1 opening or closing gate or butterfly valves without the use of an assistive device.  
2 L&I deferred to PA-C Hyde's opinion – which was that restrictions were  
3 necessary – and his restrictions were reimposed. EWWD does not dispute PA-C  
4 Hyde's opinions.

5 In his deposition, PA-C Hyde testified that Plaintiff's restrictions were  
6 considered permanent because surgery was not being considered. After his  
7 employment with EWWD ended, Plaintiff elected to have surgery.

8 During the time that Plaintiff had restrictions imposed on him until his  
9 separation from employment, EWWD accommodated him. He was provided  
10 with a helper (another EWWD employee) to assist with tasks that his restrictions  
11 prevented him from completing (twisting to open/close valves, lifting more than  
12 50 pounds). EWWD had previously accommodated Plaintiff with a helper when  
13 Plaintiff was on light duty and considered the measure to be temporary.

14 Plaintiff was responsible for calling an employee when he needed  
15 assistance. Alex Scott was typically the EWWD employee who would assist  
16 Plaintiff after no other employees volunteered to serve as Plaintiff's helper. Mr.  
17 Scott testified that during the "busy season" that ran from March through  
18 November, he helped Plaintiff "almost every day."

19 During the relevant time period when Plaintiff had restrictions from PA-C  
20 Hyde, EWWD considered purchasing a truck-mounted valve exerciser to  
21 accommodate him. A valve exerciser is a hydraulic- or gas-powered piece of  
22 equipment that may be hand-held, mounted to a trailer, or mounted to the side of  
23 a pickup truck. PA-C Hyde had recommended that Plaintiff use a truck-mounted  
24 valve exerciser. PA-C Hyde made the recommendation based on conversations  
25 with Plaintiff; he has no personal experience or knowledge of how or what a  
26 valve exerciser does.

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1       The truck-mounted valve exerciser EWWD explored purchasing is  
2 produced by E.H. Wachs. The ERV-750 model, which was examined as a  
3 potential accommodation to Plaintiff, takes up half of the bed of a pickup. The  
4 truck-mounted valve exerciser, mounting equipment, and dedicated truck to  
5 mount the equipment on, was estimated to cost more than \$80,000.

6       In addition to the cost, EWWD came to realize that the truck-mounted (or  
7 trailer-mounted) valve exerciser had limitations that would make it ineffective  
8 for Plaintiff's use in the field. Plaintiff's job required him to oversee work done  
9 by contractors at construction sites, and many of the valves at these sites could  
10 not be accessed by a truck. Given the cost of the truck-mounted valve exerciser,  
11 its limitations in accessing construction sites, and the unused availability of one  
12 already owned by EWWD, it considered the purchase to be unreasonable and did  
13 not acquire the equipment.

14       These conclusions were based in large part on the fact that the General  
15 Manager, Vince Johnston, had been the Utility Field Inspector previously and  
16 was familiar with the type of construction sites both in that role and as the  
17 director that the utility inspector would be required to access.

18       Further, at all times Plaintiff had restrictions in place, EWWD possessed a  
19 hand-held valve exerciser that Plaintiff could have used without exceeding his  
20 imposed weight restrictions. The exerciser weighs 39 pounds. EWWD is not  
21 aware of Plaintiff ever electing to use this equipment.

22       EWWD also determined that offering Plaintiff an on-the-job helper on a  
23 permanent basis was untenable and unreasonable. Whenever a helper was called  
24 to Plaintiff's job site, the helper was pulled away from his crew. The utility field  
25 inspector job is done by one person, but other EWWD crews typically work in  
26 pairs. When a helper was called out to assist Plaintiff, the work that the helper's  
27

1 crew was working on had to be paused.

2 EWWD ultimately found that it could not reasonably accommodate  
3 Plaintiff's permanent restrictions because it would have needed to designate and  
4 pay a second employee to essentially serve as Plaintiff's assistant so that Plaintiff  
5 could complete the job duties of a utility field inspector.

6 Plaintiff's employment with EWWD was terminated on November 8,  
7 2021, because he could not perform the duties of the job with or without  
8 reasonable accommodation.

9 The day after Plaintiff was terminated, EWWD posted a job for a pump  
10 technician. Plaintiff was not eligible for the position, as it was a union position  
11 and Plaintiff was not a member of the union. The position was filled by a union  
12 member. Prior to being the inspector, Plaintiff was a union member and was  
13 aware of the CBA.

14 Plaintiff testified that he is not aware of accommodation given to any other  
15 EWWD employee.

### 16 III. LEGAL ISSUES

#### 17 A. EWWD Worked to Accommodate Plaintiff, but no Reasonable 18 Accommodation was Available

19 This Court ruled on summary judgment that Plaintiff was unable to  
20 perform the essential functions of his position without reasonable  
21 accommodation and therefore the question is whether he could perform it with  
22 reasonable accommodation, therefore making him a qualified individual. ECF  
23 No. 74, p. 14.

24 In order to establish a failure-to-accommodate claim under the ADA, the  
25 plaintiff must establish that 1) he is a qualified individual with a disability, 2) he  
26 requested accommodation, 3) the employer knew of the requested

1 accommodation, and 4) the employer failed to reasonably accommodate the  
2 disability. *Sanders v. Arneson*, 91 F.3d 1351, 1353 (9th Cir. 1996). Under the  
3 ADA, discrimination includes “not making reasonable accommodations to the  
4 known physical or mental limitations of an otherwise qualified individual with a  
5 disability who is an applicant or employee, unless such covered entity can  
6 demonstrate that the accommodation would impose an undue hardship on the  
7 operation of the business of such covered entity.” 42 U.S.C. § 12112(b)(5)(A);  
8 *Poe v. Waste Connections US, Inc.*, 371 F.Supp.3d 901, 909 (W.D. Wash.  
9 2019)(internal citations omitted).

10 “An employee claiming his or her employer failed to accommodate a  
11 disability must prove that (1) the employee suffered from a disability, (2) the  
12 employee was qualified to do the job at issue, (3) the employee gave his or her  
13 employer notice of the disability, and (4) the employer failed to reasonably  
14 accommodate that disability.” *Mackey v. Home Depot USA, Inc.*, 12 Wn. App.  
15 2d 557, 586, 459 P.3d 371, 388-89 (2020).

16 “Under both the ADA and the WLAD, the duty to accommodate a  
17 disabled employee is limited to taking steps that are reasonably necessary to  
18 enable an employee to perform his or her job; the employer is not required to  
19 excuse the employee from performing essential job functions or create a job for  
20 the employee.” *Atkinson v. UPS*, No. 22646-4-II, 1999 Wash. App. LEXIS 1310,  
21 at \*16 (Ct. App. July 16, 1999). “The duty of accommodation includes  
22 evaluation of potential positions in relation to the employee's disability. The  
23 employer must determine whether open positions could accommodate the  
24 employee's disability and inform the employee.” *MacSuga v. Spokane Cty.*, 97  
25 Wn. App. 435, 444, 983 P.2d 1167, 1171 (1999) (internal citation omitted).

26 The law against discrimination prohibits discharging a  
27 person merely because she is handicapped. But, if the

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handicap prevents the employee from performing the essential functions of the job, it is not discrimination to replace her. If an opening exists within the employer's business for which the handicapped employee is qualified, RCW 49.60.180 requires that the employer take affirmative steps to help the employee fill the position. But an employer has no duty to create a job for a handicapped employee or to hire her in preference to a more qualified employee. And it is not discrimination to deny a job to a handicapped person who is unqualified.

*Id.* (internal citations omitted).

The Court found that there were remaining questions of fact on two (possible) accommodations. First, whether or not a truck mounted valve operator was reasonable. (ECF No. 74, p. 19-20). Second, whether there was a failure to accommodate because EWWD failed to assign Plaintiff to a new position. (ECF. No. 74, p. 22-23) These were found as questions of fact in part because the parties are required to engage in an interactive process. The failure to engage in the interactive process is not an independent cause of action but is relevant whether a reasonable accommodation existed that was not provided. *Kramer v. Tosco Corp.*, 233 Fed.Appx. 593, 596 (9th Cir. 2007)

Here, the evidence will establish that Plaintiff requested accommodation for a permanent back condition. It will also establish that Plaintiff sought permanent accommodation in the form of a truck mounted hydraulic valve turner. The evidence will establish that Plaintiff's medical provider, Mr. Hyde, did not provide any alternatives to a truck mounted valve turner, but rather relied exclusively on what Plaintiff stated was necessary.

In the interim, while providing a "helper" as a temporary accommodation, EWWD explored the purchase of equipment to accommodate Plaintiff. The equipment considered – a truck-mounted valve exerciser was not a reasonable

1 accommodation. The valve exerciser was 1) duplicative of equipment (a hand-  
2 held exerciser) that EWWD already owned, 2) expensive, and critically, 3)  
3 would not assist Plaintiff in the areas that he worked that were inaccessible to a  
4 truck.

5 The second potential failure to accommodate is based on Plaintiff's  
6 argument of assignment to a new position. An employer must consider positions  
7 that are available contemporaneously as well as those that may become available  
8 within a reasonable period of time. *Dark v. Curry County*, 451 F.3d 1078, 1089-  
9 90 (9th Cir. 2006) This must also be discussed between the employer and the  
10 employee. *Goodman v. Boeing Co.*, 127 Wash.2d 401, 408-09 (1995).

11 The evidence will establish that this was a union position and that as a  
12 result of the CBA Plaintiff was not qualified for the position and he made no  
13 effort to become qualified for the position.

14 **B. Plaintiff's Disparate Treatment Claims Fail as a Matter of Law**

15 Under the ADA and WLAD, it is unlawful "To discharge or bar any  
16 person from employment because of . . . the presence of any sensory, mental, or  
17 physical disability." RCW § 49.60.180(2). An employee alleging disparate  
18 treatment under WLAD has the burden of showing a prima facie case. *Callahan*  
19 *v. Walla Walla Hous. Auth.*, 126 Wn. App. 812, 819, 110 P.3d 782, 786 (2005).  
20 A plaintiff must establish that "(1) he belongs to a protected class, (2) he was  
21 treated less favorably in the terms or conditions of his employment (3) than a  
22 similarly situated, nonprotected employee, and (4) he and the nonprotected  
23 'comparator' were doing substantially the same work." *Johnson v. Dep't of Soc.*  
24 & *Health Servs.*, 80 Wn. App. 212, 227, 907 P.2d 1223, 1231-32 (1996). A  
25 plaintiff's failure to show his treatment differed from a similarly situated  
26 employee is fatal to his claim. *Yandl v. Highline Pub. Sch. Dist.* 401, No. 80901-

1 6-I, 2021 Wash. App. LEXIS 191, at \*9 (Ct. App. Feb. 1, 2021).

2 If the Plaintiff makes a prima facie showing, the burden then shifts to the  
3 EWWD to show that there was a legitimate, nondiscriminatory reason for the  
4 action. *Johnson*, 80 Wn. App. at 212. Upon that showing, the burden shifts back  
5 to the plaintiff to show that the aforementioned reason is pretextual. *Id.*

6 Similarly, under the ADA, a plaintiff must show that he “(1) has a  
7 disability within the meaning of the ADA; (2) he was qualified for the position;  
8 and (3) suffered an adverse employment action because of his disability.” *Snead*  
9 *v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1087 (9th Cir. 2001); *see also* 42 U.S.C. § 12102 (the ADA defining “disability” as “a physical or mental  
11 impairment that substantially limits one or more major life activities” of the  
12 individual).

13 The *McDonnell Douglas* framework is used to establish a prima facie case  
14 by showing (1) he was a member of a protected class; (2) that he was qualified  
15 for the position, (3) he was subject to an adverse employment action and (4) he  
16 was replaced or treated less favorably than a person outside of his protected  
17 class. *McDonnell Douglas Corp. v. Green* 411 U.S. 792, 802 (1973).

18 If the Plaintiff makes this case, then the burden shifts to EWWD to show a  
19 legitimate non-discriminatory reason for the adverse action. On Summary  
20 Judgment the Court ruled that if Plaintiff could not have been reasonably  
21 accommodated then he was not qualified for the job and Defendant does not  
22 have to set forth a legitimate non-discriminatory reason for the termination (that  
23 it could not accommodate his disability). *Poe*, 371 F.Supp. 3d at 312.

24 The evidence will establish that Plaintiff’s employment ended with  
25 EWWD because EWWD could not reasonably accommodate him. There was no  
26 option reasonably available to EWWD that would resolve Plaintiff’s restriction

1 related to twisting with torque or lifting more than 50 pounds. A valve exerciser,  
2 as explained above, would not work in the areas Plaintiff worked. It was also  
3 expensive and duplicative of EWWD's existing equipment. The court has ruled  
4 that a "helper" was not a reasonable accommodation. The position with the  
5 union was not available to Plaintiff and he was well aware of the position. An  
6 inability to reasonably accommodate Plaintiff is a legitimate nondiscriminatory  
7 reason for his termination.

8 Plaintiff must then establish that the reasons for termination were  
9 pretextual. The evidence will establish that Plaintiff cannot do so; Plaintiff had  
10 used worker's compensation claims for a number of years without any adverse  
11 action. It will establish that EWWD considered the reasonable accommodation  
12 for Plaintiff of a truck mounted valve turner and determined that it was not  
13 reasonable given all the circumstances. The evidence will also establish that the  
14 job that Plaintiff believes he should have been "offered" was available for him to  
15 sign up for it; the sign was openly posted and visible. The Plaintiff never asked  
16 any questions about the position and even at the time of his termination did not  
17 express any interest in the position, despite the fact that it had been previously  
18 posted and it was known by the employees that the position would be opening.  
19 Finally, it was a union position, and the evidence will establish that Plaintiff  
20 never inquired with the Union about the position or of joining the union. The  
21 evidence will also establish that Plaintiff was a former union member, and the  
22 hiring process for union members was well-known to him.

23 **IV. WITNESS/EXHIBITS/JURY INSTRUCTIONS/MOTIONS IN  
24 LIMINE AND VOIR DIRE**

25 Under the Court's Scheduling Order the parties filed separate witness lists,  
26 exhibits, jury instructions, motions in limine, and voir dire. Defendants lists and  
27

<sup>1</sup> Objections can be found at the following ECF:

Witness List	ECF No. 52
Exhibit List	ECF No. 53
Motions in Limine	ECF No. 56-57
Response ISO Motions in Limine	ECF No. 69
Proposed Voir Dire	ECF No. 76
Defendant's Jury Instructions	ECF No. 79

## V. CONCLUSION

11 For the reasons set forth above, Defendant East Wenatchee Water District  
12 will seek a complete dismissal of the remaining claims brought against it through  
13 motions at the time of trial and will ask a jury for a complete defense verdict, to  
14 the extent any claims are permitted to reach the jury.

DATED this 30<sup>th</sup> day of June, 2025.

## EVANS, CRAVEN & LACKIE, P.S.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on the 30<sup>th</sup> day of June, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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	Personal delivery <input type="checkbox"/>
	Email per electronic service agreement <input checked="" type="checkbox"/>
	Other:     

/s/Heather C. Yakely  
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